Nos. 18,718, 18,719

In the

United States Court of Appeals

For the Ninth Circuit

W. Willard Wirtz, Secretary of Labor, United States Department of Labor, *Appellant* vs. Western Compress Company, *Appellee*	No. 18,718
W. Willard Wirtz, Secretary of Labor, United States Department of Labor, *Appellant* vs. Federal Compress and Warehouse Company, *Appellee*	No. 18,719

Appellees' Answering Brief

Appeal from the United States District Court
for the District of Arizona

Snell & Wilmer
400 Security Building
Phoenix, Arizona

Nicholson & Moore
81 Monroe Ave.
Memphis, Tennessee

Attorneys for Appellees

SORG PRINTING COMPANY OF CALIFORNIA, 160 FIRST STREET, SAN FRANCISCO 5

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JURISDICTION

Appellees acknowledge the jurisdiction of the District Court below under the Fair Labor Standards Act of 1938 as amended, 29 U.S.C. § 201, et seq., to entertain the injunctive proceedings initiated by the Secretary of Labor under 29 U.S.C. § 217; and Appellees acknowledge the jurisdiction

of this Court of Appeals to review the judgments below under 28 U.S.C. § 1291 and § 1294(1).

APPELLEES' STATEMENT OF THE FACTS

Appellees do not controvert Appellant's statement of facts, as such. Appellees do controvert Appellant's manner of stating the question involved and his manner of stating the facts so as repeatedly to beg the issue.

The question on appeal is: Are *all* employees of Appellees at the facilities in question exempt from the overtime payment requirements of the Fair Labor Standards Act because of the exemption pertaining to "compressing of cotton" in Section 7(c) of the Act?

As is typical of the *petitio principii* approach of Appellant throughout his brief, the Secretary states the issue to be whether the compressing exemption extends to "warehouse storing".

The Secretary's problem is to convince this court, as he could not convince the court below, that storage (or, in the Secretary's term, "*ordinary warehouse* storage", whatever that phrase may mean) is not a *part* of "compressing". A principal tactic of the Secretary appears to be repeatedly to assume in definition the truth of the proposition he is trying to prove. For example, on Page 5 alone of Appellant's brief, the word "warehouse" is used five times, and begging statements are made four times, namely: ". . . by far the greater portion of the premises of each is devoted to warehouse storage of cotton rather than to compressing" ". . .; only one warehouse in each plant is utilized (and only in part) for compressing, while the others are devoted entirely to storing." "Only one compartment in the latter building is used for compressing; the others are solely for storing." ". . . when the compress machinery is in operation the press crews work exclusively in compressing activities."

All of these statements, and many more throughout Appellant's brief, impliedly define "compressing" so as to exclude storage. The approach is worthy of Charles L. Dodgson (Lewis Carroll) in "The Hunting of the Snark":

"Just the place for a snark!
I have said it twice:
That alone should encourage the crew.
Just the place for a snark!
I have said it thrice:
What I tell you three times is true."
Fit the First, Second stanza

SUMMARY OF APPELLEES' ARGUMENT

The order and judgment of the District Court, which in effect found Appellant to be engaged solely in "compressing", as the term is used in Section 7(c), were correct and should be affirmed because:

1. The "compressing" exemption of Section 7(c) is an employer exemption. If the employer is engaged only in compressing at a "place of employment", *all* employees there, whatever their particular duties may be, are exempt from the overtime requirements of the Fair Labor Standards Act.

2. "Compressing", as used in Section 7(c), encompasses the total engagement of Appellant at the locations in question. This is particularly so as to all storage of cotton. This is because:

(a) The proper standard of judicial interpretation must be applied, which is (i) to construe the word in its common sense, without artificial technicality or inherent contradiction, and (ii) to include all "closely and intimately" connected activities.

(b) "Compressing" is a cant term, in the technical sense, which has a definite meaning in the cotton industry. The Secretary of Labor has, in fact, recognized

this. The evidence is uncontradicted that in the cotton industry "compressing" is considered to encompass all storage.

(c) Compressing of necessity requires cotton storage as an integral part of the operation.

(d) The physical facilities of compresses demonstrate that the employer's only engagement is compressing.

(e) The duties of compress employees demonstrate that the employer's only engagement is compressing.

3. There is nothing in legislative history or in administrative interpretation which justifies the Secretary's position.

ARGUMENT

1. The "Compressing" Exemption in Section 7(c) Is an Employer Exemption.

It is important to bear in mind that Section 7(c) is not "an" exemption, but a series of many separate exemptions.[1]

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1. Section 7(c) reads in full:
"(c) In the case of an employer engaged in the first processing of milk, buttermilk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar-beet molasses, sugar cane, or maple sap, into sugar (but not refined sugar) or into sirup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator) of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged."

The exemption in question may be extracted:

> "In the case of an employer engaged in . . . compressing of cotton . . . the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; . . ."

The threshold question—indeed, the basic question—is whether Appellees, as employers, are engaged *only* in compressing of cotton. Of course, in a real sense, the answer is dependent upon knowledge of the actions of Appellees' employees. An employer necessarily carries out his business purposes through the acts of his employees.

But there is a qualitative difference between an employer exemption and an employee exemption. It is a matter of relationship. In an employee exemption, the critical relationship is the relation of the employee to his work. In employer exemptions, the critical relationship is the relation of the employee's work to his employer's business purpose. For illustration, under Section 13(a)(10)[2], the employee exemption there applies if the individual employee is engaged in "handling" agricultural commodities for market. Whatever the overall business of the employer may be, the particular employee is not exempt unless he, himself, is doing a particular activity, such as "handling". In contrast, under an employer exemption such as in Section 7(c), the particular activity of the employee may be anything at all, so long as it is in furtherance of the employer's "engagement". The employer's exemption is thereby a broader and more flexible exemption, which encompasses any kind of employee physical or mental activity, so long as the activity

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2. Section 13(a)(10) reads:
"(10) any individual employed within the area of production (as defined by the Secretary), engaged in handling, packing, storing, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products;"

furthers the employer's engagement in the particular exempted occupation.

Therefore the Secretary's case falls unless he can maintain the proposition that Appellees, as employers, are "engaged" in not one but *two* distinguishable engagements, "compressing" and "ordinary warehouse storage".

2. "Compressing" as Used in Section 7(c) Encompasses the Total Engagement of Appellant at the Locations in Question.

"Compressing" is not defined in the Fair Labor Standards Act. The Secretary of Labor is not given authority to define the term by regulation. This is in contrast to other portions of the Act, such as the "area of production" definition as to which Congress did grant the Secretary such authority. The problem of this case is a problem of definition. It is not to be solved—despite the Secretary's urging—by subordinating the court's prerogative to administrative ukase.

Standards of interpretation. Appellant cites *Shain v. Armour & Co.*, 50 F. Supp. 907 (W.D. Ky. 1943) as rejecting a "strict and technical construction" of the words used in Section 7(c) in favor of a "common sense interpretation". Appellees could not agree more—if the Secretary were as solicitous of "common sense" in construing exemptions. In *Armour* the shoe was on the other foot; the employer there wanted to be strict and technical. In this case, it is the Secretary who scorns "common sense" and who seeks to be strict and technical. Common sense is not an optional standard as suits the Secretary's convenience. Appellees believe the standard to be fairly and correctly stated in *McComb v. Hunt Foods, Inc.*, 167 F.2d 905 (9th Cir. 1948) *cert. denied*, 335 U.S. 845, 93 L.ed. 395, 69 S.Ct. 68 (1948):

> "The Fair Labor Standards Act was fashioned to accomplish certain results—to benefit labor and also to make specific beneficial exemption provisions for a

> certain class of employers described in the Act. Whatever the motive of Congress in so framing this type of 'double-barreled' legislation, the fact remains that its provisions must be read and applied as a whole. The exemption provisions clearly indicate a deliberate purpose on the part of Congress to exclude certain business operations from the sweep of the statute . . .
>
> * * * * * * *
>
> "This is but another way of saying that if the business operations claimed to be exempt are found to fall within the exempt classification, the statute is, as to them, a 'remedial' statute. We agree with the lower court that no formalistic characterization should be permitted in dealing with any of these clauses since the plain intention of the statute should be carried out."

The Secretary's disregard of common sense for expediency is illustrated by the dilemma which the Secretary's position poses. The Secretary, to defeat the Section 7(c) exemption, must maintain that Appellees are engaged in something other than compressing, namely, ordinary warehouse storage. Warehouse storage, *separately* considered, is not per se "in commerce" within the meaning of the Act. *Walling v. Jacksonville Paper Co.,* 317 U.S. 564, 87 L.ed. 460, 63 S.Ct. 332 (1943). In *Hampton v. Marshall, et al.* (D.C. N.D. Texas 1941), 4 Labor Cases, Par. 60,661, involving a farmer's warehousing of cotton "under loan" to the Commodity Credit Corporation, the court said:

> "The Court doesn't believe that the man who grows a product upon the farm is engaged in interstate commerce within the provisions of the Act of Congress, so far as concerns any act yet passed. They may yet pass some that may more definitely define just when the product of the farm may be said to go into interstate commerce. The court doesn't believe that the farmer, because he procures a loan on his cotton, has done

> anything that will place it in interstate commerce any more than if he had left it at his gin or stored it in his own private warehouse upon his premises."

Something more than ordinary warehouse storage is required—in the language of *Jacksonville Paper*—"to establish that practical continuity in transit necessary to keep a movement of goods 'in commerce' within the meaning of the Act." This continuity can exist only if storage is an integral part of a total, unified business of Appellees—the receiving, storing, compacting, rebinding, and shipping movement in which, by natural sequence, a compress launches the cotton into interstate commerce.

Appellees do not urge that their storage of cotton is not in commerce, because "common sense" and honesty compel them to the conclusion that storage is so much an integral part of compressing that it would be captious to say that all storage is not an integrated part of a common movement of the goods into commerce. But if the court is to accept the Secretary's faulty premise that "compressing" and "warehouse storage" are separate engagements, the logical corollary can only be that the "warehouse storage" "comes to rest" before it enters commerce. Because—for the purpose of commerce coverage—the Secretary must argue that storage is closely and intimately related to Appellees' non-storage activities, but must then turn around and argue that storage is not closely and intimately related to non-storage activities in order to defeat Appellees' Section 7(c) exemption, it ill behooves the Secretary to appeal to "common sense".

Common sense dictates, and the Supreme Court has held in *Maneja v. Waialua Agricultural Co.,* 349 U.S. 254, 99 L.ed. 1040, 75 S.Ct. 719 (1955) that the Section 7(c) employee exemptions are *extended* exemptions, not narrowed.

The extension applies to all "closely and intimately connected" activities. The Supreme Court there said, in discussing the exemption for the "processing of sugar cane":

> ". . . this exemption extends to 'employees in any place of employment [where the processing is carried on].' This we feel, covers the workman during the processing season while making emergency repairs in the mill, cleaning the equipment during the week end shutdown, and performing other tasks closely and intimately connected with the processing operation."

The Secretary, however, finds another use for the "close and intimate" connection. Instead of recognizing that this standard enlarges the exemption, the Secretary looks upon it as defeating the compressing exemption entirely. If the Secretary's position were to be accepted, there would be no effective 7(c) exemption in the compressing industry whatever. Because storage cannot be, and is not, set apart from all other compressing activities, and because of the close and intimate interrelationship of employee storage duties with all other operations, the storage which the Secretary would have held to be non-exempt would contaminate the entire plant operations. That this is the Secretary's true aim is evident from the Appellant's brief in which the Secretary makes clear that if Appellees are held to be engaged in any non-exempt work the Secretary will then assert that the unavoidable mixing of exempt and non-exempt work eliminates the exemption entirely upon "the well established rule that the performance of both exempt and non-exempt activities by an employee and the same workweek results in the loss of the exemption." (Appellant's Brief, p. 11, footnote 7, and pp. 14-16.). What the Congress hath given, the Secretary taketh away.

Industry meaning of "compressing". "Compressing" has a definite trade meaning. The term includes storage activi-

ties, just as the word "compress" (the right word in trade use, not "warehouse". Record, p. 99) includes the entire plant facility. This is evident from the deposition of Mr. Dellinger, a man of forty-five years' experience in the cotton business, responding to the government attorney's valiant efforts to get him to say the magic word "warehouse". Record, pp. 98-99:

> "Q. . . . Are you talking about warehouse weight, or warehouse sample, or are you talking about the compress weight which is related to the compress machine itself?
>
> A. Naturally you don't either sample or weigh with a compress machine, but they are all incidental to the shipment and assembly of the cotton. We don't refer to these plants as warehouses; we refer to them as compresses.
>
> Q. Although it is a licensed warehouse under Arizona law?
>
> A. That is correct.
>
> Q. Now, what about the issuance of a negotiable warehouse receipt; is that not a warehouse operation?
>
> A. That is a warehouse operation in connection with the compress, yes. I can't distinguish between—knowing this operation, I can't—in other words, we certainly wouldn't build a warehouse and conduct a warehouse operation in the business we are in without a compress. In other words, they are simply tied together.
>
> Q. Is it not true, then, that you are engaged in two types of businesses: a warehouse and a compress business?
>
> A. Well, we are engaged in the warehouse business to the extent that we have to be. That is about the only answer I can give you. I don't consider we are in the warehouse business. We are in the compress business."

As was said in *Fleming v. Hawkeye Pearl Button Co.*, 113 F.2d 52, 57 (8th Cir. 1940):

> "The interpretation given to the term 'processing' by the trade affected by the exemption is significant. In Carter v. Liquid Carbonic Pacific Corporation, 9 Cir., 97 F.2d 1, 3, the court, in considering the question as to whether a particular product was a 'carbonated beverage' or a 'soft drink' within the meaning of the Revenue Act of 1932, Par. 615(a)(7), 26 U.S.C.A. Int. Rev. Acts, p. 613, said: 'Since we are dealing with a tax which is directed at a particular industry, this definite proof of a trade usage as to the term "carbonated beverages" calls into application the familiar rule that commercial and trade terms having a uniform and definite meaning in commerce and trade will be interpreted accordingly.' "

When it suits his purpose the Secretary adopts the industry meaning of "compressing". In 29 Code of Federal Regulations §§ 780.734 and .735 in discussing the meaning of "compressing", as used in Section 13(a)(10), the Secretary says:

> " 'Compressing' is a term generally applied to the cotton industry only, and the legislative history indicates the intention of Congress to give it such an application here. In practical effect, therefore, the exemption is limited to the compressing of cotton for market.
>
> * * * * * * *
>
> ". . . it does not, however, refer to the process of pressing any commodities other than cotton, such as cottonseed, flaxseed, tung nuts, peanuts, fruits or vegetables, sugar cane or beets, or soybeans, all of which are frequently subjected to a form of pressing operation in extracting oil, juice, or syrup . . ."

In other words when it comes to beets and tung nuts, "compressing" means what the word means to the cotton

industry; but when it comes down to cotton, "compressing" doesn't mean what it means to the cotton industry after all.

Necessity for Storage. Storage is an inescapable concomitant of compress operations. Cotton bales are received from the gin for compressing on a predictable seasonal curve. Record, pp. 18, 19, 36, 38 and 40. The compress cannot compress bales as rapidly as they are received, particularly in the peak season. Record, pp. 78, 79. But cotton is not marketed in the same pattern. Marketing follows the market. Movement into the market depends on the price of cotton and on the orders of shippers. The duration of storage is not in the control of the compress and is not predictable in advance. Record, pp. 15, 88, 89. It is markedly affected by the federal government's own policy under the cotton loan program of the Commodity Credit Corporation, which is intentionally designed to permit the farmer to hold his cotton off the market. Record, pp. 79, 80, 81. This, of course, has the effect of aggravating the need for storage space. Record, p. 81.

There has never been a compress which did not store cotton, nor could there be in an operation such as compressing. The compressing business stands like a floodgate in the stream of cotton to market, impounding the seasonal natural flood of cotton and releasing it gradually into the controlled channels of orderly commerce. In Mr. Dellinger's words, "The compress historically has been the assembly point for the cotton." Record, p. 85.

Congress did not intend, and no court should take the position that an activity which has always been of necessity performed, and which cannot be eliminated, is not a part of an exempt activity. It strains reason to believe one part of an activity which is indistinguishable from another identical part as to location, employees involved,

nature of duties, and, in fact, in all respects, except "on paper", should be exempt, and the identical remainder not. Yet, the Secretary would have this Court so hold. Congress, in the Commodity Credit Program, adopted a policy calculated to avoid the seasonal flood of cotton to market. Certainly Congress could not have intended a Fair Labor Standards Act exemption for compressing which would have the opposite effect by conferring an exemption on only those compressers which would abandon entirely their historic method of doing business, handle only "in transit" cotton, and so open the floodgates of cotton to market.

Physical Facilities. Appellees' compress plants are located in areas in which cotton is grown in large quantities, near the farming and ginning sites. Each plant is on a single enclosed site. At each site are buildings which contain the compressing machinery, storage areas, power plant, repair and maintenance facilities, office space, and, in some cases, residences. Record, pp. 12, 13, 27-29. The compressing machinery is centrally located, the focus of all cotton movement. But for the need for separation and fire walls for fire protection, the ideal facility would be a single large area, with the compressing machinery at its center. Record, p. 74.

Appellant argues (Appellant's Brief, pp. 16-19) that "Employees who perform work in areas not devoted to compressing activities are not within the Section 7(c) exemption for compressing." The circularity of this argument has a bizarre fascination, a "begging" argument of classical purity. The Secretary's initial premise is that "compressing" is carried on only in one building at Federal Compress and in only one compartment at Western Compress. (Appellant's Brief, p. 16) From this it follows that office employees who are not in that building or compartment are

not at a "place of employment" where compressing is carried on. This, in turn, brings the argument full circle to show that it is "incompatible" with the exemption to consider the exemption to apply to employees in the office area. Q.E.D.!

Grant the major premise, and the Secretary's argument is "logical": "Compressing is carried on only in Compartment A. Activity B does not take place in Compartment A; therefore, activity B is not compressing." The snare is to grant the major premise, for to do so concedes the ultimate issue in this case. The conclusion is no more true than the "logically" correct conclusion which is drawn from the propositions: "Scotch whiskey drinkers live only in Scotland. I do not live in Scotland; therefore, I do not drink Scotch."

Appellees have no quarrel in principle with decisions such as *Fleming v. Swift & Co.,* 41 F. Supp. 825 (N.D. Ill. E.D. 1941), which hold that employers who conduct admittedly separate kinds of business at a single location cannot claim that a single "place of employment" concept will turn a non-exempt engagement into an exempt one, such as, for example, in the *Swift* case, as to turn the manufacture of a non-meat product like soap into "slaughtering."

But such cases as *Swift* are not to the point. A judicial or administrative definition of "slaughtering" sheds no light whatever on the meaning of "compressing." The actual physical facilities of the compress plants in this case, without words, speak much more to the point. To borrow a concept from the law of negligence, each structure, and the location, size and function of each structure, meets a "but for" test. But for the economic need to compress cotton there would be no compressing machinery, there would be no storage areas, no power plants, no residences, no office

personnel, no office space, no railroad sidings. The central activity, the activity of compacting the bales of cotton to greater density, is the "proximate cause" of every facility at the appellee's plants. The entire plants are "places of employement" and all activities thereon are "compressing."

Employee Duties. In no other area of fact is the unrealistic and destructive approach of the Secretary better illustrated than in the area of employee duties. In no other case has the Secretary adopted a position which is more extreme. The Secretary proposes a distinction which depends in no way whatever upon any distinguishing characteristic of employee activity.

The artificiality and near-absurdity of the Secretary's position is evident in the Secretary's interpretive Bulletin. 29 C.F.R. Section 780.953 subsection (b) reads:

> "Compressing of Cotton.—The term 'compressing of cotton' includes all the operations which are directly connected with pressing gin bales of cotton into standard density or high density bales, or pressing standard density bales into high density bales, as a part of a single process. Included within the term are the receiving and weighing of bales arriving for compression only or for compression prior to storage; moving the bales to be compressed from receiving areas to the press, or from storage to the press; operating the press or the dinky press, including removing bands, feeding, tying, sewing, and hoisting; and moving the bales from the press to transportation media or to storage after compressing."

Here one finds that "receiving", "weighing" and "moving" bales of cotton are exempt if performed incident to compressing.

Subsection (d), however, reads:

> "Nonexempt operations.—Activities performed in connection with ordinary warehouse storage (as opposed

> to temporary or 'transit' storage, defined in paragraph (c) of this section) are not exempt under this section of the Act. Thus, receiving, weighing, and moving cotton received for ordinary storage, and office, watching, and other work done in connection with ordinary storage, are nonexempt. Also not exempt are activities performed in connection with the storage or handling of bales which pass through the establishment without being compressed, and such activities as handling bagging, ties, or fertilizer sold by the employer."

Now we find that "receiving", "weighing" and "moving" are not exempt if in connection with "ordinary storage."

Thus the same employee, working for the same employer, in the same job, at the same location, and performing the same repetitive activity on identical goods is, according to the Secretary, working from minute to minute, or from bale to bale, either at exempt work incident to compressing or at non-exempt work in connection with ordinary warehouse storage. In simple illustration:

(a) Jones, a trucker, picks up a bale of cotton from the receiving dock and moves it by fork lift to a storage area. He immediately returns over the same route and in exactly the same manner, picks up a second bale, which he moves to the storage area next to the first bale. The first bale is "in transit" cotton; the second is not. In the Secretary's view, Jones was engaged in an operation incident to compressing as to the first bale, but in a storage operation as to the second.

(b) Jones immediately returns and picks up a third and then a fourth bale of "in transit" cotton, which he places in storage next to the first two. Two days later the shipper directs the compress to hold the

> third bale indefinitely, but to ship the fourth bale. The shipper's act, *two days after the fact,* has changed the character of Jones' work from exempt work incident to compressing to non-exempt work incident to ordinary warehousing, not only for that day but for the entire work week.

In similar cavalier fashion, the Secretary dismisses the admitted fact that Appellees' work forces are completely unified and integrated into but a single work force, with a single line of promotion, with a single chain of supervision and administration, without distinction between "storage" personnel and "compressing" personnel, and with regular and from job assignment to job assignment. Record, pp. 22-23, 82-84. These facts do nothing to suggest to the Secretary that possibly the *nature* of the compressing business is unitary. Instead, the Secretary sees in this only untidy management by Appellees who "find it convenient or preferable to at times engage their employees interchangeably in exempt and non-exempt activity." (Appellant's Brief, p. 16). Noticeably, Appellant's Brief offers no suggestions as to how Appellees might conveniently, or at all, do otherwise.

Appellant's catalogue of the purported distinctions between "warehousing" and "compressing" which appears on pages 23 and 24 of Appellant's Brief, warrants close judicial scrutiny. The Court will note that every one of the distinctions made are distinctions "on paper" (licenses, tariffs, warehouse receipts, and income) with the single possible exception of duration of storage. No one of the distinctions exists "in the field." This is true even as to duration of storage; for the storage period is a period of quiescence involving no employee activity. The handling of

the cotton is the same whether the bales remain for six days or for six months. The Secretary's interpretation of the compressing exemption under Section 7(c) is "paper" thin.

3. There Is Nothing in Legislative History or in Administrative Interpretation Which Justifies the Secretary's Position.

A large part of the Secretary's brief is devoted to an effort to raise the Secretary's interpretation of the law to the level of sovereign immunity. He seems to share his view of his role in government with Louis XIV, *"l'ètat, c'est moi."* To this august pinnacle he claims to have been raised by Congress and—by his own bootstraps—by his past administrative interpretations. He is not correct.

Legislative history. The Secretary makes a little mickle of legislative history do many a muckle. The Secretary relies greatly on the argument that because the phrase "compressing and storing" in early drafts of the Act was changed by floor amendment, without explanation in debate, that this demonstrates that, in connection with compressing, "storing was the subject of explicit Congressional attention, and that storing was deliberately excluded from its scope." (Appellant's Brief, pp. 19-20). It is true that the original phrase "compressing and storing" was reduced to "compressing". It is also true that the phrase "ginning and baling" was reduced to "ginning". The House Labor Committee changed the initial wording "ginning and baling of cotton" to "ginning, compressing and storing of cotton." The only comment on the change in the report is that "A committee amendment proposes as an additional exemption persons employed in connection with the ginning, compressing, and storing of cotton, or with

the processing of cottonseed." (H.R. Rep. 1452, Senate Bill 2475, Aug. 6, 1937, 75th Congress, 1st. Sess. p. 14). If this shows anything at all, the use of the words "in connection with" indicates an intent for a broad construction of terms.

Supposing the reduction of the phrase "compressing and storing" to "compressing" to show, as the Secretary says, an explicit congressional intent to remove storage from the scope of "compressing", by exactly the same reasoning—if it be reasoning—the reduction of the phrase "ginning and baling" to "ginning" showed an explicit congressional intent to exclude baling from the scope of "ginning". Baling, of course, is an intimate and integral part of the ginning process. To hold baling to be non-exempt work as to ginning would have the same practical effect of writing the exemption entirely out of the law as would be the effect of exclusion of storage from the meaning of compressing. The Secretary has apparently overlooked this golden opportunity to destroy the exemption for the ginning industry; for in his Wage & Hour Release No. M-9, dated February 14, 1947, he recognizes that "ginning" means the removal of cottonseed from lint and the subsequent pressing and wrapping of the bale of lint.

The Secretary is not utterly without resourcefulness in this arena, however. He has taken to the Supreme Court the proposition that the phrase "ginning *and* compressing of cotton" in Sec. 7(c) shows a congressional intent to exempt only those businesses which both gin *and* compress, an exercise of ingenunity which was rejected by the courts in *Peacock v. Lubbock Compress Company,* 252 F.2d 892 (5th Cir., 1958), *cert. denied* 356 U.S. 973, 2 L.ed.2d 1147, 78 S.Ct. 1136 (1958). Thus the Secretary, that embodiment of "experience and informed judgment", has seriously maintained that compressing must *include* ginning but *exclude*

storage in order to be exempt, in the face of the reality that compresses *never* gin and *always* store.

In the *Peacock* case, the Fifth Circuit said:

> "The statute, of course, says 'ginning *and* compressing of cotton.' If it is conjunctive, the watchmen are right, the Compress is wrong, and the cause must be reversed. This is so because it is admitted that the Compress Company is engaged exclusively in compressing cotton and never has engaged in the activity of ginning cotton or a combination of ginning and compressing. Actually, it cuts much deeper since it is an acknowledged undisputed fact of the cotton industry that compressing is an operation entirely removed from ginning and that the two are never carried on together. To read it literally here is to read it out of the statute.
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> * * * * * * *
>
> "For us to conclude that Congress meant 'and' in a literal conjunctive sense is to determine that Congress meant in fact to grant no relief. To do this is to ignore realities, for Congress has long been acutely aware of the manifold problems of the production, marketing and distribution of cotton. The commodity is one of the most important in the complex pattern of farm parity and production control legislation. It is inconceivable that Congress legislated in ignorance of the distinctive nature of the physical operations of ginning of cotton as compared to the compressing of cotton, or that, with full consciousness of these practicable considerations, it meant to lay down a standard which could not be met in fact."

Appellees do not presume, as does the Secretary, to divine congressional intent from such meager legislative history. Appellees do suggest that there are two other more reasonable explanations than the explanation of the Secretary's to account for the omission by Congress of "storage" from Section 7(c). One reason, the most probable, is that

like "baling" in relation to "ginning", the word is tautologous. A second reason is that Congress did not wish to grant the 7(c) exemption to warehouses, which do nothing but store cotton. There are many more such warehouses than there are compresses. Congress could exempt and did exempt cotton storage warehouses under Section 13(a)(10). To exempt such warehouses under Sec. 7(c) would have created a nation-wide exception. The scope of Section 13(a)(10) is limited to "areas of production." A natural and rational interpretation of congressional intent is simply that Congress intended to exempt certain agricultural warehouses, cotton among others, in "areas of production", but not to exempt similar warehouses outside of such areas. The "unfair competition" argument advanced by the Secretary is meretricious. It is not unreasonable to assume that Congress could not have intended to exempt storage at compresses because Congress would then have given compresses a competitive advantage. It is absolutely clear that by enacting Section 13(a)(10) Congress intended to create exactly such a competitive advantage in favor of occupations within "areas of production" over their competitors not so fortunately located.

Administrative interpretation. The Secretary's position that his past administraive interpretations have resolved the problem of defining compressing calls to mind the comic placard, "Are You Helping to Solve the Problem, or Are you Part of It?"

Appellant's Brief cites Section 16 of the administrative Interpretative Bulletin No. 14, issued August 21, 1938. This section reads:

> *"Ginning and Compressing of Cotton.*
>
> This term includes the operations of separating the cotton lint from the seed, pressing and wrapping such

lint into bales, and then compressing such bales. The receiving and weighing of the lint, both before and after compressing, would also seem to be part of the compressing operation. Such operations, therefore, are included within the exemption.

The storing of cotton, either before or after compressing, is not, in our opinion, included in the term 'ginning and compressing of cotton.' Support for this position is found in the fact that the word 'storing' was in the bill at one time in connection with an exemption from the hour provisions and was subsequently deleted. (See also par. 23)."

If one follows the Bulletin's instructions to "See par. 23" (which Appellant's Brief does *not* cite), one finds par. 23 (a) to read:

"Which Employees Are Exempt.

The determination as to whether all employees of the employer who are working in the establishment are included in the exemption or whether the exemption applies to only such employees as perform the operations described in the section must be made in the light of the legislative history of section 7(c). The congressional debates show that the purpose of this section was to relieve processors of seasonal agricultural commodities from the hour provisions of the act so as to enable them more easily to conduct their operations during the peak seasons. *It is our opinion, therefore, that only the employees who perform the operations described in section 7 (c) or who perform operations that are so closely associated thereto that they cannot be segregated for practical purposes, and whose work is also controlled by the irregular movement of commodities into the establishment, are covered by the exemption.* For example, in the ordinary case, none of the employees in a department separate from the department in which the exempt operations are performed will be exempt. Thus, employees work-

> ing in the meat-curing or sausage-making departments of a meat packing house will not be within the exemption." (Emphasis supplied.)

The compresses' continuous position has been that the Secretary's interpretations in Pars. 16 and 23(a) are squarely contradictory. Storage of cotton at compresses meets every standard for exemption under Par. 23(a), as an operation which is "closely associated", which "cannot be segregated for practical purposes" and which is "controlled by the irregular movement of commodities into the establishment." This fundamental functional standard controls over the Secretary's Par. 16 *ipse dixit.*

It was not until 1961, after the filing of this action, that the Secretary attempted to resolve his own self-contradiction by promulgating Part 780, Title 29—Labor, Chap. V—Wage & Hour Division, Department of Labor, Section 780.953, Code of Federal Regulations. Even then he "split the difference." *Some* storage operations ("incident to compressing") are conceded to be exempt—the Par. 23(a) test of Bulletin No. 14. But *some* storage is said not to be exempt (the "ordinary warehouse" kind)—using the fiat approach of Par. 16. In short the only consistent administrative position has been to be contradictory, arbitrary, ambiguous and impractical.

In any case, the Secretary has paid no more than lip service to whatever he conceives his true position to have been. The instant case is a case of no more than second impression in the more than 20 years since enactment of the Fair Labor Standards Act, even though the compresses' position in opposition to the Secretary has been constant and clear. The only prior case on point supports the compresses. In *Byus v. Traders Compress Co.,* 59 F. Supp. 18 (D.C. W.D. Okla., 1942). There the court found and held:

"During each week of the period involved in each of these cases the defendant was engaged at its compress plant located near Oklahoma City in Oklahoma County, Oklahoma, in the compression of cotton and incidental to its compression operations it was engaged in storing and physically handling cotton in bales and shipping cotton for the account of its customers. Each of the plaintiffs was employed by and worked for the defendant in the business of compressing cotton as presser, truck driver and handyman.

* * * * * * *

Conclusions of Law

1. The defendant was engaged in the business of compressing cotton within the meaning of sec. 207(c), 29 U.S.C.A., and each of the plaintiffs was employed in such place of business of the defendant and the provisions of subdiv. (a) sec. 207, 29 U.S.C.A. did not apply to the plaintiffs as employees in defendant's place of business."

As his trump card the Secretary claims that his interpretation of the compressing exemption is now above attack because in 1949 Congress in amending the Fair Labor Standards Act—on points which had nothing whatever to do with the compressing exemption—included, as Section 16(c), a "saving" provision to the effect that prior administrative orders, regulations and interpretations should remain in effect, except to the extent inconsistent with the amendments. Act Oct. 26, 1949, 63 Stat. 920, 29 U.S.C. 208 note. This, the Secretary contends, elevated beyond controversion all then existing administrative interpretations, by imposing thereon the "unique imprimatur" of Congress.

The Secretary disregards these points: First, as discussed, the pre-1949 administrative interpretation of "compressing" was unclear and contradictory, and in any event

was not the 1961 interpretation. Second, Congress in the Fair Labor Standards Act has *not* given the Secretary comprehensive rule-making powers. Congress has withheld such authority except in specific instances, no one of which here applies. When Congress wants the Secretary's interpretations to have the force of law Congress says so directly and unmistakably. Third, in 1949 Congress must be assumed to have been as well aware of the 1944 Supreme Court decision of *Skidmore v. Swift & Co.,* 323 U.S. 134, 89 L.ed 124, 65 S.Ct. 161, as it was of prior administrative interpretations. By not having reversed *Skidmore* in the 1949 legislation, Congress presumably intended the case to stand as correctly stating the extent and measure of the weight of the Secretary's interpretations. The *Skidmore* standard appears below in the quotation from *Mitchell v. Trade Winds Company,* 289 F.2d 278 (5th Cir. 1961).

"Unique Imprimatur" sounds sweetly to the ear of the Secretary, and he frequently repeats it. Indeed, the phrase *is* lambent with an aura of pontifical infallibility. But in *Trade Winds* the court of the Fifth Circuit stoutly withstood conversion to Secretaryism:

> "As we have indicated, the Secretary's position is supported by his early interpretation of the Act to the extent that he expressed the view that only those activities should be considered as processing that were affected by the natural forces that caused Congress to create the exemption in the first instance. He urges that not only is this interpretation entitled to 'great weight,' Steinmetz v. Mitchell, 5 Cir., 268 F.2d 501, but it should be considered as having received the 'unique imprimatur' of Congress, Libby, McNeil & Libby v. Mitchell, 5 Cir., 256 F.2d 832, 837. This because, in adopting the 1949 amendment to the law, Congress expressly provided that existing interpretations of the Administrator or of the Secretary of Labor 'shall remain in effect.'

"We think the recognized basic authority as to the recognition to be accorded ex parte administrative rulings by the Secretary of Labor in administering the Wage and Hour law is that stated by the Supreme Court in Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124:

> "'We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'

"We consider that this formula is the one by which we are to weigh the administrative interpretation in this case. Although the appellant's brief asserts that the amendatory Act of 1949 'expressly declared * * * that existing administrative interpretations not inconsistent with the amendments shall remain in effect,' he fails to include in the text of his argument the rest of the section which is 'as an order, regulation, interpretation * * *' It is plain, therefore, that all this provision was intended to accomplish was to negative the idea that following the amendment it would be necessary for the Secretary to promulgate new orders, regulations and interpretations as to matters not changed in the Act. It was not intended to, and, of course, it did not, incorporate the prior existing orders, regulations and interpretations as part of the statutory enactment."

Far from being satisfied with the "imprimatur" of the Secretary, Congress has expressed sheer exasperation. In

the Fair Labor Standards Amendments of 1961[3] Congress directed the Secretary to study "the complicated system of

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3. Sec. 13 Fair Labor Standards Amendments of 1961, Pub. L. 87-30, Act of May 5, 1961, 87th Congress, which reads:

"Sec. 13. The Secretary of Labor shall study the complicated system of exemptions now available for the handling and processing of agricultural products under such Act and particularly sections 7(b)(3), 7(c), and 13(a)(10), and the complex problems involving rates of pay of employees in hotels, motels, restaurants, and other food service enterprises who are exempted from the provisions of this Act and shall submit to the second session of the Eighty-seventh Congress at the time of his report under section 4(d) of such Act a special report containing the results of such study and information, data and recommendations for further legislation designed to simplify and remove the inequities in the application of such exemptions."

The Secretary has not as yet been up to the full task set him by Congress. He submitted to Congress "data pertinent to an evaluation of exemptions available under the Fair Labor Standards Act" Feb. 21, 1962 (U.S. Gvt. Printing Office: 1962 0-630503); but so far no recommendations for legislation. The Secretary's letter of transmittal of the data to Congress reads:

"February 21, 1962

"The Honorable Lyndon B. Johnson
President of the Senate
Washington 25, D.C.

Dear Mr. President:

Transmitted herewith is the final report on the exemptions available for the handling and processing of agricultural products, prepared by the Wage and Hour Division in accordance with section 13 of the Fair Labor Standards Amendments of 1961. A preliminary report was transmitted on January 31, 1962.

The final report includes, in addition to the information contained in the preliminary report, an inter-industry analysis. With respect to the exemptions from the maximum hours provisions, further analyses of the data are now being made. These analyses will concern the effects of providing various exemption periods and the effects of various hours limitations on the exemption, as well as the effects of providing no overtime exemption for each of the industries engaged in the handling and processing of farm products. When the work has been completed, legislative recommendations will be developed and submitted to the Congress."

exemptions" for the handling of agricultural products, particularly as to Sections 7(b)(3), 7(c) and 13(a)(10), and to make recommendations for further *legislation* "designed to simplify and remove the inequities in the application of such exemptions." This strong language is not the genial permission of an indulgent Congress for the Secretary to continue on his merry untrammeled way. Instead, it is a command to him to cease administrative tinkering and to return the problem to the Congress for orderly and comprehensive reappraisal. The Secretary's steps should lead him to Congress, not to this court.

CONCLUSION

For the reasons here set forth, Appellees pray that this court affirm the judgment appealed from.

Respectfully submitted,

Snell & Wilmer
and
Nicholson & Moore

By Frederick K. Steiner, Jr.

Attorneys for Appellees

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Frederick K. Steiner, Jr.